No. _____

In the

Supreme Court of the United States

_____

Derrick Lenard Smith,

Petitioner,

v.

United States of America,

Respondent.

_____

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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QUESTION PRESENTED

Whether 18 U.S.C. §924(c)(3)(A) includes all offenses that require an attempt to inflict bodily injury?

PARTIES TO THE PROCEEDING

Petitioner is Derrick Lenard Smith, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Derrick Lenard Smith seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published opinion of the Court of Appeals is reported at *United States v. Smith*, 957 F.3d 590 (5th Cir. April 30, 2020)(unpublished). It is reprinted in Appendix A to this Petition. The district court's order denying relief under 28 U.S.C. 2255 is available at *Smith v. United States*, 2018 WL 1014171 (Feb. 21, 2018). It is reprinted in Appendix B.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on February 26, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES

Section 924(c) of Title 18 provides in relevant part:

> (3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—
> (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
> (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Section 1113 of Title 18 provides:

> Except as provided in section 113 of this title, whoever, within the special maritime and territorial jurisdiction of the United States, attempts to commit murder or manslaughter, shall, for an attempt to commit murder be imprisoned not more than twenty years or fined

under this title, or both, and for an attempt to commit manslaughter be imprisoned not more than seven years or fined under this title, or both.

Section 1114 of Title 18 provides:

Whoever kills or attempts to kill any officer or employee of the United States or of any agency in any branch of the United States Government (including any member of the uniformed services) while such officer or employee is engaged in or on account of the performance of official duties, or any person assisting such an officer or employee in the performance of such duties or on account of that assistance, shall be punished—
(1) in the case of murder, as provided under section 1111;
(2) in the case of manslaughter, as provided under section 1112; or
(3) in the case of attempted murder or manslaughter, as provided in section 1113.

STATEMENT OF THE CASE

A. Summary

Petitioner Derrick Lenard Smith has served twenty years of a 110 year sentence. 75 years of this term depends on the proposition that 18 U.S.C. §924(c) may be combined with the attempted murder prong of 18 U.S.C. §1114(3) to state a valid federal offense. The court below concluded that these offenses could be combined, but this Court's forthcoming decision in *Borden v. United States*, No. 19-5410, __U.S.__, 140 S.Ct. 1262 (March 2, 2020)(granting cert.), stands to shed significant light on this subject. Because the answer to that question will determine whether Petitioner serves only a very harsh federal sentence (35 years) or whether he will instead die in prison with his sentence undischarged, this Court should hold the Petition until it resolves *Borden*. Where so much is at stake, Petitioner should not lose his last opportunity for relief from a conviction for a non-existent offense because his *certiorari* deadline predates a potentially relevant authority by a matter of a few months. *See Stutson v. United States*, 516 U.S. 193, 196 (1996).

B. Procedural History

A jury convicted Petitioner of one count of conspiring to commit bank robbery, one count of bank robbery under 18 U.S.C. §2113(d), one count of using a firearm in connection with the bank robbery under 18 U.S.C. §924(c), three counts of attempted murder, and, most relevant here, three counts of using a firearm in connection with these attempted murders. *See United States v. Smith*, 296 F.3d 344, 346 (5th Cir. 2002).

These last three counts gave rise to three consecutive sentences of 25 years each, all run consecutive to the sentences on every other count. *See Smith*, 296 F.3d at 346; [Appx. B], *Smith v. United States*, 2018 WL1014171, at *1 (N.D. Tex. Feb. 21, 2018); [Appx. A], *United States v. Smith*, 957 F.3d 590, 591 (5th Cir. April 2, 2020). These counts each rested on a combination of 18 U.S.C. §924(c), which prohibits the use of a firearm in connection with a crime of violence, and 18 U.S.C. §1114(3), which prohibits, *inter alia*, attempted murder of a person assisting federal authorities. *See* [Appx. A], *Smith*, 957 F.3d at 594.

In 2015, this Court ruled that the "residual clause" of 18 U.S.C. §924(e) is unconstitutionally vague. *See Johnson v. United States*, 576 U.S. 591 (2015). That clause dubs a "violent felony" any offense that poses a serious potential risk of physical injury to another. *See* 18 U.S.C. §924(e)(2)(B)(ii). Because four of Petitioner's offenses arose under 18 U.S.C. §924(c), whose definition "crime of violence" contains a similar (though not identical) "residual clause," he filed an action under 28 U.S.C. §2255. *See* 18 U.S.C. §924(c)(3)(B); [Appx. B], *Smith*, 2018 WL1014171, at *1. Specifically, he argued that *Johnson* invalidated the residual clause in §924(c), and that neither of the statutory offenses used as a "crime of violence" otherwise qualified. *See* [Appx. B], *Smith*, 2018 WL1014171, at *1; [Appx. A], *Smith*, 957 F.3d at 591-592.

The district court denied the motion on the sole ground that 18 U.S.C. §924(c)(3)(B), the statute's "residual clause," is not unconstitutionally vague. *See* [Appx. B], *Smith*, 2018 WL 1014171, at *1. This Court held otherwise, see *United*

States v. Davis, __U.S.__, 139 S. Ct. 2319, 2336 (2019), but the court of appeals nonetheless affirmed, *see* [Appx. A], *Smith*, 957 F.3d at 594.

In particular, the Fifth Circuit held that both bank robbery under 18 U.S.C. §2113(d) and attempted murder under 18 U.S.C. §1114(3) constitute crimes of violence because they have as an element "the use, attempted use, or threatened physical force against the person or property of another." *See* [Appx. A], *Smith*, 957 F.3d at 593-596. As pertains to the attempted murder conviction, the court below held that the causation of death – like the causation of any other bodily injury – always amounts to the use of physical force against the person of another. *See* [Appx. A], *Smith*, 957 F.3d at 595. It cited *Castleman v. United States*, 572 U.S. 157 (2014), in support of that proposition. *See* [Appx. A], *Smith*, 957 F.3d at 595. And it further held that the attempted commission of a "crime of violence" under this "force clause" necessarily constitutes the attempted use of physical force against the person or property of another. *See* [Appx. A], *Smith*, 957 F.3d at 596.

REASONS FOR GRANTING THE PETITION

There is a reasonable probability that this Court's forthcoming decision in *Borden v. United States*, No. 19-5410, __U.S.__, 140 S.Ct. 1262 (March 2, 2020)(granting cert.) will reveal error in the sole ground for decision below. This Court should hold the instant Petition pending that decision, and grant *certiorari*, vacate the judgment below, and remand for reconsideration in the event that the petitioner prevails in that case.

Section 924(c)(3) of Title 18 defines a "crime of violence" to include a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §924(c)(3)(A). It also includes offenses that pose a risk of the use of force, but this Court has held that portion of the definition unconstitutionally vague. *See* 18 U.S.C. §924(c)(3)(B); *United States v. Davis*, __U.S.__, 139 S.Ct. 2319 (2019). The court below concluded that Petitioner's attempted murder conviction satisfied Subsection (3)(A) because it had as an element the attempted use of physical force against the person of another.

Subsection (3)(A), §924(c)'s "force clause," is very similar in wording to a number of other statutory and Guideline provisions used to classify offenses as violent. These include 18 U.S.C. §16(a), 18 U.S.C. §924(e)(2)(B)(i), USSG §4B1.2(a)(1), and the version of USSG §2L1.2, comment. (n. 1), operative from the years 2001 through 2015. Before this Court's decisions in *Castleman v. United States*, 572 U.S. 157 (2014), and *United States v. Voisine*, __U.S.__, 136 S.Ct. 2272 (2016), these provisions were given a narrow reading by the federal courts of appeals.

In particular, many courts of appeals distinguished between inflicting injury and using physical force. These courts held that the mere causation of injury did not necessarily satisfy a "force clause," absent some specification in the statute as to the mechanism by which injury was inflicted. *See Chrzanoski v. Ashcroft*, 327 F.3d 188, 195-196 (2d Cir.2003), *questioned by United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018); *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012), *held abrogated in In re Irby*, 858 F.3d 231, 238 (4th Cir. 2017); *United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006), *overruled by United States v. Reyes-Contreras*, 910 F.3d 169, 181-182 (5th Cir. 2018) (*en banc*); *United States v. Rodriguez-Enriquez*, 518 F.3d 1191, 1193-1196 (10th Cir. 2008), *held abrogated in United States v. Ontiveros*, 875 F.3d 533, 546 (10th Cir. 2017).

Further, most courts of appeals held that crimes lacking an intent requirement – strict liability crimes, or those requiring negligence or recklessness– fell outside this classification. *See Castleman*, 572 U.S. at 159, n.8 ("Although *Leocal* reserved the question whether a reckless application of force could constitute a "use" of force, the Courts of Appeals have almost uniformly held that recklessness is not sufficient.")(internal citation omitted)(collecting cases).

Many courts responded to *Castleman* and *Voisine* by broadening their interpretations of the "force clauses." *See United States v. Ellison*, 866 F.3d 32, 37 (1st Cir. 2017); *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018); *In re Irby*, 858 F.3d 231, 238 (4th Cir. 2017); *United States v. Reyes-Contreras*, 910 F.3d 169, 181-182 (5th Cir. 2018) (*en banc*); *United States v. Ontiveros*, 875 F.3d 533, 546 (10th Cir. 2017);

United States v. Bettcher, 911 F.3d 1040, 1046 (10th Cir. 2018); *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018). The question before the Court in both *Borden v. United States*, No. 19-5410, __U.S.__, 140 S.Ct. 1262 (March 2, 2020)(granting cert.), and the case at bar is whether they may have jumped the gun, overlooking important differences between the force clause at issue in *Castleman* and *Voisine*, and the one at issue in provisions like 18 U.S.C. §924(c).

Castleman involved a defendant convicted under 18 U.S.C. §922(g)(9), which forbids possession of firearms by persons convicted of a "misdemeanor crime of domestic violence." *Castleman*, 572 U.S. at 159. The term "misdemeanor crime of domestic violence" receives its definition in 18 U.S.C §921(a)(33), and includes misdemeanors that:

> **ha[ve], as an element, the use or attempted use of physical force**, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim…

18 U.S.C §921(a)(33)(emphasis added).

Castleman held that even acts of non-injurious touching – force in the "common law" sentence – may qualify as "the use of physical force" for the purposes of this definition. *See Castleman*, 572 U.S. at 162-163. It held as much in spite of *Johnson v. United States*, 559 U.S. 133 (2010), which had held that the "use of physical force" described in 18 U.S.C. §924(e)'s "force clause" referred to great, violent, or injurious force, not common law force. *See Johnson*, 559 U.S. at 139, 145.

Distinguishing *Johnson*, the *Castleman* court stressed that the definition of a "misdemeanor crime of violence" was broader than the definition of "violent felony" found in 18 U.S.C. §924(e). *See Castleman*, 572 U.S. at 164-168. It reasoned that a broader concept of "physical force" would be appropriate to a provision like §922(g)(9), which expressly targets domestic violence. *See id*. 1at 64-166. Domestic violence, this Court noted, often manifests as a pattern of non-injurious physical domination. *See id*. Further, this Court observed that §922(g) and §921(a)(33) expressly targets a less legally serious class of crimes than §924(e). *See id*. at 166-167. Whereas §922(g) and §921(a)(33) include only "misdemeanors," §924(e) includes only "felonies," indeed "violent felonies" that render the defendant an "armed career criminal." *See id*. It was therefore logical to believe that the "force clause" in §921(a)(33) might be much easier to satisfy than the one in §924(e). *See id*. at 164-168.

Castleman also argued that his offense fell outside the "force clause" in §921(a)(33) because it could be violated by indirect acts of force, such as injurious deception or poisoning. The Court rejected the argument with the following commentary:

> *Castleman* is correct that under *Leocal v. Ashcroft,* 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), the word "use" "conveys the idea that the thing used (here, 'physical force') has been made the user's instrument." Brief for Respondent 37. But he errs in arguing that although " [p]oison may have 'forceful physical properties' as a matter of organic chemistry, ... no one would say that a poisoner 'employs' force or 'carries out a purpose by means of force' when he or she sprinkles poison in a victim's drink," *ibid.* The "use of force" in Castleman's example is not the act of "sprinkl[ing]" the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter. Under Castleman's logic, after all, one could say that pulling the trigger on a

> gun is not a "use of force" because it is the bullet, not the trigger, that actually strikes the victim. *Leocal* held that the "use" of force must entail "a higher degree of intent than negligent or merely accidental conduct," 543 U.S., at 9, 125 S.Ct. 377; it did not hold that the word "use" somehow alters the meaning of " force."

Id. at 170–71. Yet, the Court explicitly stressed that it was not deciding "[w]hether or not the causation of bodily injury necessarily entails violent force." *Id*. at 167. Accordingly, and given its extensive efforts to distinguish the "force clause" in §924(e), *Castleman* would seem to be of limited value in deciding whether injury necessarily entails "the use of physical force against the person of another" for purposes other than §921(a)(33).

But this is not how many courts of appeals saw the matter. Rather, those courts thought that *Castleman* wholly abrogated the distinction between force and injury, even in the context of "force clauses" that demanded violent force. *See Ellison*, 866 F.3d at 37; *Irby*, 858 F.3d at 236; *Reyes-Contreras*, 910 F.3d at 180-181; *Ontiveros*, 875 F.3d at 546. An exception was the First Circuit, which has issued inconsistent opinions. *Compare Whyte v. Lynch*, 807 F.3d 463, 470-72 (1st Cir. 2015), *with Ellison*, 866 F.3d at 37.

A similar course of events happened after *Voisine*. *Voisine*, like *Castleman*, pertained to §921(a)(33), the definition of a "misdemeanor crime of domestic violence." *See Voisine*, 136 S.Ct. at 2276. In *Voisine*, the defense argued that this definition excluded reckless offenses because such offenses lack the "use" of force. *See id*. This Court disagreed, and explained:

> …the word "use" does not demand that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so. Or,

> otherwise said, that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.

Id. at 2278–79.

Yet the *Voisine* court expressly reserved the question of whether reckless assaults would qualify under other force clauses, here 18 U.S.C. §16(a). *See id.* at 2240, n.4 ("Like *Leocal*, our decision today concerning § 921(a)(33)(A)'s scope does not resolve whether § 16 includes reckless behavior. Courts have sometimes given those two statutory definitions divergent readings in light of differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states."). In spite of this reservation, some courts of appeals broadened their interpretation of force clauses outside the context of §921(a)(33), concluding now that they did indeed reach reckless conduct. *See Reyes-Contreras*, 910 F.3d at 183; *Bettcher*, 911 F.3d at 1046; *Haight*, 892 F.3d at 1281.

Recently, however, this Court granted certiorari to decide whether the "force clause" in 18 U.S.C. §924(e) encompasses reckless conduct. *See Borden v. United States*, No. 19-5410, __U.S.__, 140 S.Ct. 1262 (March 2, 2020)(granting cert.). In that case, the defense has noted an important textual difference between the force clause in §924(e) and that at issue in §921(a)(33). *See* Brief for Petitioner in *Borden v. United States*, No. 19-5410, 2020 WL 4455238, at *14-17 (Filed April 27, 2020)("Petitioner's Brief in *Borden*"). While §921(a)(33) encompasses all offenses that have as an element "the use … of physical force," §924(e) catches only those that have as an element "the use …of physical force *against the person of another*." *See* Petitioner's Brief in *Borden*, at *16 ("In its text and context, the provision at issue in *Voisine* differs in significant

respects from the ACCA's force clause. Most importantly, that provision lacks the critical restriction that force be used "against the person of another."). As this Court explained in *Leocal v. United States*, 543 U.S. 1 (2004), this additional restrictive phrase changes considerably the natural meaning of the term "use":

> While one may, in theory, actively employ *something* in an accidental manner, it is much less natural to say that a person actively employs physical force against another person by accident. Thus, a person would "use ... physical force against" another when pushing him; however, we would not ordinarily say a person "use[s] ... physical force against" another by stumbling and falling into him. When interpreting a statute, we must give words their "ordinary or natural" meaning. The key phrase in § 16(a)—the "use ... of physical force against the person or property of another"—most naturally suggests a higher degree of intent than negligent or merely accidental conduct.

Leocal, 543 U.S. at 9 (internal citation omitted, citing *Smith v. United States*, 508 U.S. 223, 228 (1993)).

The defense in *Borden* has thus argued that the use of force "against the person of another" does not in ordinary parlance refer to unintentional conduct. *See* Petitioner's Brief in *Borden*, at **21-22. This distinguishes *Voisine*, which construed a provision lacking this phrase.

In the event that this Court embraces this argument in *Borden*, the result may cause the court below to reevaluate its holding that 18 U.S.C. §924(c)(3)(A) encompasses all intentional causation of injury, irrespective of the mechanism. The court below relied on *Castleman*'s discussion of the "use of physical force" when it equated force and injury. *See* Appendix A; *United States v. Smith*, 957 F.3d 590, 595 (5th Cir. April 30, 2020). Indeed, it even cited *Voisine*, the very precedent at issue in *Borden*. *See id*. But a victory for *Borden* would illustrate that this Court's holdings

regarding the scope of §921(a)(33) cannot be blindly applied to the force clauses of other provisions. In particular, the *Borden* opinion may emphasize the significance of the restrictive clause "against the person of another."

If this clause is significant to the intent question, and *Leocal* suggests that it is, *see Leocal*, 543 U.S. at 9, it is surely also significant to the required *mechanism* of injury. The use of force "against the person" calls to mind a particular kind of violent injury: one requiring direct bodily contact, and not an indirect mechanism involving deceit.

Significantly, when the First Circuit noted these linguistic and contextual differences between 921(a)(33) and other force clauses, it held that indirect force is ***not*** "the use of physical force against the person of another," even after *Castleman*. *See Whyte*, 807 F.3d at 470-72. A *Borden* opinion emphasizing those differences could lead other circuits to the same conclusion.

Indeed, the conflicting opinions in the First Circuit regarding the force/injury distinction after *Castleman* illustrate that the perceived scope of that holding – whether it is confined to §921(a)(33) or instead extends more broadly – may be dispositive to the fate of the force/injury distinction. The *Whyte* panel of the First Circuit held that statutes requiring injury alone do not satisfy the force clause of 18 U.S.C. §16(a). *See Whyte*, 807 F.3d at 470-72. In support, it emphasized the different statutory goals of §921(a)(33) of 18 U.S.C. §16(a), a force clause substantially identical to the one at bar, and similar to that found in 18 U.S.C. §924(e). *See Whyte*, 807 F.3d at 470-72 (citing *Castleman*).

But another panel read *Castleman* more broadly, and found that it simply abrogated any distinction between force and injury for all purposes. *See Ellison*, 866 F.3d at 37 (citing *Castleman*); *Lassend v. United States*, 898 F.3d 115, 126–27 (1st Cir. 2018)("We need not decide whether some methods of indirectly causing physical harm —for example, deliberately withholding vital medicine—do not involve the use of violent force, because Lassend's challenge to the use of § 120.05(7) as an ACCA predicate suffers from an antecedent flaw."). In other words, a First Circuit panel's view of the scope of *Castleman* produces or explains its view of the force/injury distinction outside of §921(a)(33). And a victory for *Borden* would necessarily cabin *Voisine* to §921(a)(33) and surely serve as very persuasive authority for a very similar view of *Castleman*.

The decision below depends entirely on the notion that all actions causing death, an extreme form of injury, amount to "the use of physical force against the person of another" irrespective of the mechanism. *See* Appendix A; *Smith*, 957 F.3d at 595. But if *Borden* calls the premise into question, it will at least be an "intervening development … reveal(ing) a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation…" *Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

Significantly, the federal murder statute expressly contemplates and authorizes prosecution for the use of poison, 18 U.S.C. §1111(a), so federal attempted

murder under 18 U.S.C. §1113 would plainly contemplate prosecution for attempt to deploy a mechanism of this kind. See 18 U.S.C. §1111(a). **This is not a case involving only a theoretical or hypothetical application of the statute of conviction. *Cf. Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).** Given the reasonable probability that the court below may reconsider the basis for the decision, it is appropriate to hold the case until *Borden* is decided and, in the event that *Borden* prevails on the grounds advanced in his brief, grant certiorari, vacate the judgment below, and remand for reconsideration (GVR). *See Lawrence*, 516 U.S. at 168.

Such GVR orders are especially favored in criminal cases because "our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." *Stutson v. United States*, 516 U.S. 193, 196 (1996). And here the case for such solicitude is surely at its zenith here, where the question before the Court is whether 75 years of criminal imprisonment is premised on a non-existent criminal offense. Surely, the Court can at least wait until it issues a forthcoming opinion on a closely related issue before discarding Petitioner's last chance at relief.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 28th day of September, 2020.

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